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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 97

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

vs.

SANTA FE PACIFIC RAILROAD COMPANY

No. 98

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

vs.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 3, 1946
CERTIORARI GRANTED JUNE 10, 1946

SUPREME COURT OF THE UNITED STATES

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1 In the United States Court of Appeals, District of Columbia

No. 8956

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

v.

HAROLD L. ICKES, OSCAR L. CHAPMAN, FRED W. JOHNSON, APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Joint appendix

In United States District Court

Complaint for injunction and relief in the nature of mandamus

Filed March 7, 1944

1. Plaintiff, Santa Fe Pacific Railroad Company, is a corporation created and organized under the Act of March 3, 1897, c. 374, 29 Stat. 622, and sues in its own right and as lawful successor to the Atlantic and Pacific Railroad Company, a corporation created and organized under the Act of July 27, 1866, c. 278; 14 Stat. 292.

2 2. The defendants are residents of the District of Columbia, the defendant Harold L. Ickes being Secretary of the Interior and as such charged by law with the administration of the laws of the United States relating to public lands, the defendant Oscar L. Chapman being Assistant Secretary of the Interior and charged with like duties under the direction of the Secretary and in particular with the supervision of the General Land Office, and the defendant Fred W. Johnson being Commissioner of the General Land Office and charged by law with the administration of that office under the supervision and direction of the Secretary and Assistant Secretary of the Interior. The defendants are sued individually and in view and because of acts done or threatened by them under color of their offices and authority.

3. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $3,000, and involves the construction of certain laws of the United States under which plaintiff claims vested rights in and to certain public lands, and the duty of the defendants, respectively, to determine plaintiff's rights in and to the lands in question and plaintiff's right to a patent to the said

lands, upon a proper construction of the laws under which plaintiff's rights are claimed, and without regard to a certain release executed by plaintiff and filed with the defendant, the Secretary of the Interior, as hereinafter more particularly stated.

4. Plaintiff, Santa Fe Pacific Railroad Company, is successor to the Atlantic and Pacific Railroad Company and to the land grant to the latter company under the Act of July 27, 1866, c. 278, 14 Stat. 292, and is fully vested with all the rights of the Atlantic and Pacific Railroad Company under the said Act of July 27, 1866, in and to the lands thereby granted.

5. Included in the lands so granted, and acquired and owned by plaintiff as successor to the said Atlantic and Pacific Railroad Company, prior to December 18, 1911, were the following
3 described lands in New Mexico, to wit, the SW¼SW¼ and the SE¼NE¼ of Section 29, Township 10 North, Range 2 West, New Mexico Meridian, being lands within the primary limits of the said grant, title to which vested in plaintiff's predecessor, the Atlantic and Pacific Railroad Company, as of March 2, 1872, upon the definite location of the said railroad.

6. November 2, 1911, plaintiff was requested by the Commissioner of the General Land Office, acting for the Secretary of the Interior, to relinquish to the United States said Section 29 of Township 10 North, Range 2 West, New Mexico, the relinquishment to be made under the Act of April 28, 1904, 33 Stat. 556, entitled An Act for the relief of small-holding settlers within the limits of the grant to the Atlantic and Pacific Railroad Company in the Territory of New Mexico, which provided as follows:

"That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

A copy of the letter of the Commissioner of the General Land Office, dated November 2, 1911, requesting the relinquishment, is attached hereto and made part hereof, marked Exhibit A.

7. Thereafter, by deed of relinquishment dated December 18, 1911, plaintiff relinquished the said Section 29 above described including the $SW\frac{1}{4}SW\frac{1}{4}$ and the $SE\frac{1}{4}NE\frac{1}{4}$ thereof, to the United States, under the said Act of April 28, 1904, and the same was accepted and approved by the Commissioner of the General Land Office and the Secretary of the Interior. Copies of the deed of relinquishment and accompanying letter dated February 12, 1912, from Britton & Gray, Attorneys for Santa Fe Pacific Railroad Company, to the Commissioner of the General Land Office, of letter dated March 5, 1912, from the Commissioner of the General Land Office to the Secretary of the Interior recommending approval, with approval by the First Assistant Secretary of the Interior dated March 21, 1912, and letter dated May 22, 1912, from the Commissioner of the General Land Office to Britton & Gray authorizing the selection of other lands in lieu of the lands relinquished, under the said Act of April 28, 1904, are attached hereto and made part hereof, marked Exhibit B.

8. Thereafter, August 28, 1940, plaintiff, Santa Fe Pacific Railroad Company, exercised the right of selection, based on the relinquishment of the said $SW\frac{1}{4}SW\frac{1}{4}$ and $SE\frac{1}{4}NE\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, New Mexico, acquired as stated in paragraph 7 supra, by making and filing selections, under the Act of April 28, 1904, of certain lands, to wit, the $SW\frac{1}{4}SW\frac{1}{4}$ of Section 33, Township 7 North, Range 10 West, and the $SE\frac{1}{4}SW\frac{1}{4}$ of Section 35, Township 7 North, Range 10 West, New Mexico (the said lands so selected being vacant public land available for selection), in lieu of the designated base or relinquished lands above described, to wit, the $SW\frac{1}{4}SW\frac{1}{4}$ and $SE\frac{1}{4}NE\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, New Mexico, the latter not having been theretofore designated as base for any similar selections and being valid for that purpose. The said selections were filed in the local land office of the Department of the Interior, at Las Cruces, New Mexico, in accordance with the regulations of the Department of the Interior (Title 43, Code of Federal Regulations, sections 273.56–273.57), being designated as Las Cruces 058331 and 058332, and in due course were forwarded to the General Land Office for further action.

9. December 18, 1940, while the said selections were pending and as yet unapproved, plaintiff, Santa Fe Pacific Railroad Company, filed with the Secretary of the Interior, pursuant to section 321 (b), Title III, Part II, of the Transportation Act of 1940, be-

ing the Act of September 18, 1940, c. 722, 54 Stat. 954, U. S. Code, Title 49, secs. 65–66, a release of

"any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad."

The said release was accepted and approved by the Secretary of the Interior on March 1, 1941. A copy thereof is attached hereto and made part hereof, marked Exhibit C.

10. June 12, 1943, by decision of the Commission of the General Land Office, plaintiff was notified that in view of the said release the Santa Fe Pacific Railroad Company had no further rights under the Act of April 28, 1904, and that the said selections, Las Cruces 058331 and 058332, would be rejected.

11. Thereafter, on or about July 10, 1943, in accordance with the regulations and rules of practice of the Department of the Interior, plaintiff appealed to the Secretary of the Interior from the decision of the Commissioner of the General Land Office rejecting the said selections.

12. January 8, 1944, the defendant, Oscar L. Chapman, as Assistant Secretary of the Interior, acting for the defendant the Secretary of the Interior, affirmed the decision of the Commissioner of the General Land Office. A copy of the said decision, dated January 8, 1944, is attached hereto and made part hereof, marked Exhibit D.

6 13. January 18, 1944, plaintiff filed with the Secretary of the Interior a motion for rehearing. February 8, 1944, plaintiff's motion for rehearing was denied by the defendant the Assistant Secretary of the Interior.

14. Plaintiff avers that its right under the Act of April 28, 1904, to select other lands, in lieu of the lands relinquished and conveyed to the United States as hereinabove stated, was and is a contractual right derived from the said Act of April 28, 1904, and the relinquishment and conveyance to the United States of the base lands above described, at the request of the Secretary of the Interior; that plaintiff has fully performed its obligation under the said contract by relinquishing and conveying to the United States the said base lands as requested; that the lands so relinquished and conveyed to the United States have not been designated or used as base for any other selections; that plaintiff is entitled to the lands selected subject to the approval of the Secretary of the Interior

upon a determination that the said lands are "vacant public land of equal quality" with the base lands; that the release, described in paragraph 9 supra, does not apply to and does not include rights of selection under the Act of April 28, 1904, because it is a release of claims to lands, or interests therein, granted to plaintiff or its predecessor in interest in aid of the construction of any portion of its railroad, whereas plaintiff's rights under the Act of April 28, 1904, are of a different character and not derived from any grant to plaintiff or its predecessor; that in rejecting the said selections on the ground that the approval thereof is barred by the said release the defendants have acted on an erroneous construction of the law and have gone beyond the authority and powers conferred on them by law and have arbitrarily disregarded and departed from their plain duty to approve the said selections if found to be otherwise valid and in accord with the law and regulations.

15. Plaintiff further avers that the action of the defendants in rejecting the said selections on the ground stated and in denying plaintiff's right to a patent to the lands selected is in violation of plaintiff's vested rights in and to the said lands and casts a cloud on plaintiff's title and right thereto; that plaintiff has exhausted all remedies, by appeal or otherwise, in the Department of the Interior, and that its only remaining remedy is by application to this court for a decree enjoining the defendants from rejecting the said selections on the ground stated, and directing the defendants to determine plaintiff's right to the approval of the said selections without regard to the release filed by plaintiff pursuant to section 321 (b) of the Transportation Act of 1940; that unless such relief is granted plaintiff will be wholly denied and deprived of its rights under the said Act of April 28, 1904, in violation of the law and of the terms of the said contract, and will suffer loss and injury for which it has no other remedy whatever.

Wherefore, the premises considered, plaintiff prays:

1. For a temporary restraining order or injunction, pendente lite, and upon final hearing a decree, enjoining the defendants from rejecting the said selections filed by plaintiff under the Act of April 28, 1904, on the ground that they are barred and all rights of the plaintiff therein extinguished by the release filed pursuant to section 321 (b) of the Transportation Act of 1940; and directing the defendants to determine the rights of the plaintiff in the said selections and to the lands selected, without regard to the said release.

2. For such other and further relief as the case may require and may be necessary and appropriate.

SANTA FE PACIFIC RAILROAD COMPANY,
By LAWRENCE CAKE, *Attorney.*

8 DISTRICT OF COLUMBIA:

I, Lawrence Cake, being duly sworn depose and say, that I am attorney for Santa Fe Pacific Railroad Company, a corporation, that I have read the above complaint, and that I verily believe the facts therein stated to be true.

LAWRENCE CAKE.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 28th day of February 1944.

[SEAL]

ALMA B. NEWELL,
Notary Public.

LAWRENCE CAKE,
717 National Press Building, Washington, D. C.
Attorney for Plaintiff.

Exhibit C to complaint

RELEASE

Santa Fe Pacific Railroad Company, a corporation organized and existing by virtue of an Act of Congress approved March 3, 1897 (29 Stat. 622), with office and principal place of business at New York, in the State of New York, hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

9 This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

In witness whereof, Santa Fe Pacific Railroad Company has caused this Release to be signed in its corporate name and acknowledged or proved by its President and its corporate seal to be hereunto affixed and the same to be attested by the signature of its Secretary, this 17th day of December 1940.

[SEAL] SANTA FE PACIFIC RAILROAD COMPANY,
By (Sgd.) E. J. ENGEL, *Its President.*
Attest:
(Sgd.) R. M. HOGIN, *Its Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this 17th day of December 1940, before me, the undersigned George Julius Howard, a notary public within and for the county aforesaid, appeared E. J. Engel and R. M. Hogin, to me personally known, who, being by me severally and duly sworn, did say that he, the said E. J. Engel, is the President, and he, the said R. M. Hogin, is the Secretary, of Santa Fe Pacific Railroad Company, the corporation which executed the foregoing instrument, and that the seal affixed thereto is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said E. J. Engel, as President as aforesaid, and the said R. M. Hogin, as Secretary as aforesaid, acknowledged before me the said instrument to be the free act and deed of said corporation, and acknowledged that they, as President and Secretary respectively, executed the said instrument on behalf of said corporation for the purpose and consideration therein expressed.

Witness my hand and notarial seal this 17th day of December 1940.

(Sgd.) GEORGE JULIUS HOWARD,
Notary Public.

My commission expires March 30, 1941.

Exhibit D to complaint

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, January 8, 1944.

A. 23690.

SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Las Cruces 058331, 058332.
Application for selection of lieu lands rejected.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICES

* * * * *

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of June 12, 1943, rejecting its applications, Las Cruces 058331 and 058332, to select the SW¼SW¼ Sec. 33, T. 7 S., R. 10 W., N. M. M., in lieu of the SW¼SW¼ of Sec. 29, T. 10 N., R. 2 W., N. M. M.; and the SE¼SW¼ Sec. 35, T. 7 S., R. 10 W., N. M. N., in lieu of the SE¼NE¼ Sec. 29, T. 10 N., R. 2 W., N. M. M., all in the State of New Mexico.

The Atlantic and Pacific Railroad Company was named as grantee of a congressional land grant in aid of the construc-
11 tion of its railroad in the act of July 27, 1866 (14 Stat. 292).

The Santa Fe Pacific Railroad Company, hereinafter referred to as the Santa Fe Company, purchased the property of the Atlantic and Pacific Railroad Company at foreclosure sale and by the act of March 3, 1897 (29 Stat. 622), Congress confirmed the grant of July 27, 1866, to the Santa Fe Company. On December 26, 1911, acting pursuant to the act of April 28, 1904 (33 Stat. 556), and the regulations issued thereunder (43 CFR 273.56-273.57), the Santa Fe Company relinquished to the United States certain portions of the granted land which were then claimed by settlers. The relinquishment was approved on March 21, 1912, and by letter of May 22, 1912 ("F" 236212 CSB) the Commissioner of the General Land Office informed the Santa Fe Company that it had a right to select an equal quantity of land of equal quality within the Territory of New Mexico in lieu of the land relinquished.

On August 28, 1940, the Santa Fe Company filed its applications to select lieu lands with the register at Las Cruces, New Mexico. The register suspended the applications because of the Santa Fe Company's failure to tender the required fees and to file accompanying applications for classification of the land under section 7 of the Taylor Grazing Act (48 Stat. 1272, 43 U. S. C. sec. 315e). The filing fees were paid on October 2, 1940, and the petitions for classification were filed on October 10, 1940.

On December 18, 1940, in accordance with section 321 (b) of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65) and the regulations issued thereunder (43 CFR 273.61-273.67), the Santa Fe Company, together with the Atchison, Topeka and Santa Fe Railway Company, operator of the line of railroad, filed releases which provided that each company

"* * * relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to

lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have
12 been granted, or claimed should have been granted by any act of the Congress to San Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad * * *"

The releases stated that they did not embrace

"* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 19, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

The releases were approved March 1, 1941.

On June 12, 1943, the Commissioner of the General Land Office rejected the selections on the ground that the release of December 18, 1940, relinquished all rights the Santa Fe Company had under the act of April 28, 1904, and refused to consider the petitions for classification because of the rejection of the selections.

In this appeal, the Santa Fe Company alleges that the release of December 18, 1940, filed pursuant to the Transportation Act of 1940, did not relinquish rights which had accrued under the Act of April 28, 1904, and that it was deprived of the right to prove that the selection was protected by the saving clause of section 321 (b) of Part II, Title III of the Transportation Act applicable to innocent purchasers. Thus the appeal presents but two questions to be determined: (1) Whether or not the selection right accruing under the act of April 28, 1904, was included in the release of December 18, 1940. (2) Whether or not appellant was illegally deprived of the right to show that this selection right was excepted from the release under the innocent purchaser provision of the saving clause of section 321 (b) of Part II, Title III of the Transportation Act of 1940.

The act of April 28, 1904, provides:

"That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when
13 requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to

select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

The enactment of this statute followed the act of March 3, 1891 (26 Stat. 861), as amended by the act of February 21, 1893 (27 Stat. 470), which recognized the validity of the claims of occupants of land within the States of Colorado, Nevada, and Wyoming and the Territories of New Mexico, Arizona, and Utah who had been in adverse possession for 20 years and permitted each of such occupying claimants to retain 160 acres of such land. The act of April 28, 1904, gave the Santa Fe Company as successor in interest of the Atlantic and Pacific Railroad Company an option to relinquish or to reconvey to the United States, at the request of the Secretary of the Interior, such portions of its lands in the Territory of New Mexico, which it had acquired under the grant of July 27, 1866, as had been occupied by settlers for a period of 25 years. Upon exercise of the option, the Santa Fe Company became entitled to select and to have patented to it, in lieu of the land acquired under the grant of 1866, other land of equal quality within the Territory of New Mexico.

From the foregoing, it is evident that the purpose of the act of April 28, 1904, was to reimburse the Santa Fe Company for losses in the grant of July 27, 1866, occasioned by the inability of
14 the United States to furnish good title to lands acquired from Mexico under the treaty of Guadalupe-Hidalgo in 1848 and the Gadsden purchase of 1853 which were occupied by settlers who had entered in good faith. The Santa Fe Company exercised the option to relinquish two 40-acre tracts to which it was entitled under the grant of 1866 and thus became entitled to select and to receive patent to other land in lieu thereof. The 1904 act operated to replace losses in the original grant of 1866. Land acquired under the later act was to be substituted for land included in the grant of July 27, 1866. It cannot therefore be disputed that the grant of 1904 was in aid of the construction of a railroad.

The Transportation Act of 1940 required the land grant railroads to file releases of all claims under any grant of land "to aid in the construction of a railroad" as a condition precedent to the grant of the privilege of charging the United States full rates for transportation of freight and passengers, with certain exceptions. And the release filed by the Santa Fe Company covered any and all claims under "any act of Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest," and not merely claims arising under the original grant of July 27, 1866. It follows that all claims arising under the grant of 1904 were relinquished by this release unless specifically excepted by its terms.

The release excepts only lands sold to an innocent purchaser for value prior to September 18, 1940, lands patented or certified to the company or any predecessor in interest and "lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940." Appellant's present claim does not fit any of these categories. There is no proof that the land which th Santa Fe Company now seeks to select was ever sold to an innocent purchaser. There is no showing that patent to the land was ever issued to the Santa Fe Company. There was no approved selection prior to September 18, 1940, when
15 the Transportation Act became effective. It is true that a selection list was offered for filing on August 28, 1940, but there was no payment of the required filing fees at that time. The application for selection was not effective until October 2, 1940, when the filing fees were paid (43 C. F. R. 273.58). But this application was not approved by the Secretary.

Clearly, in the absence of an approved selection prior to September 18, 1940, appellant has no claim against the United States to any of the lands involved. The release included all rights which the Santa Fe Company had and the right now asserted was not included in the exceptions. It is true that upon the Santa Fe Company's relinquishment of granted lands the United States became obligated to convey such lands as the Company should select in lieu thereof, but the United States incurred no obligation in the absence of a selection of the lieu land. The Santa Fe Company relinquished its right to select lieu lands in exchange for the benefits of the Transportation Act of 1940. It is now enjoying those benefits and is, therefore, precluded from insisting upon a return of the consideration. This Department is not concerned with the wisdom of the bargain that was made, but it is obliged to measure the present rights of the Santa Fe Company in the light of that bargain.

Appellant's further allegation of error that because of his decision of June 12, 1943, the Commissioner afforded it no opportunity to prove that its attempted selection was made in the interest of innocent purchasers whose rights had accrued long prior to September 18, 1940, is without merit. The assertion of this contention is a denial of appellant's first contention that the claim now asserted was not covered by the release filed on December 18, 1940, since obviously the alleged selection could be protected under the saving clause of section 321 (b) of Part II, Title III, of the Transportation Act of 1940, only because it was subject to the release required by that act. The Department finds that this claim was subject to the release, but that appellant is not entitled
16 to the protection of the innocent purchaser provision because it has not shown that it is entitled to such protection.

The regulations of December 10, 1940 (43 C. F. R. 273.70) require that:

"* * * Full details of the alleged sale must be furnished, such as dates, the terms thereof, the estate involved, consideration, parties, amounts and dates of payments made, and amounts due, if any, description of the land, and transfers of title * * * No application for a patent under this act will be favorably considered unless it be shown that the alleged purchaser is entitled forthwith to the estate and interest transferred by such patent * * *"

Appellant has made no effort to comply with these provisions of the regulations. It merely makes the assertion in its argument on appeal that the Commissioner gave it no opportunity to offer proof that innocent purchasers' rights are involved. The Commissioner was not required to do so; under the regulations, the burden is upon the applicant to assert and establish such rights. Appellant failed to furnish the Commissioner with proof of sale to an innocent purchaser and has made no attempt to do so during the pendency of the appeal. The Department cannot supply such proof. Accordingly, the appeal must be determined without consideration of the rights of innocent purchasers.

The Commissioner's decision is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

* * * * *

Defendant's Exhibit 1—CA-23,373

* * * * *

Filed Nov. 16, 1944.

17 UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, February 8, 1944.

A. 23690.

SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Las Cruces 058331, 058332.
Application for selection of lieu land rejected.
Motion denied.

MOTION FOR REHEARING

In a decision dated January 8, 1944, the Department affirmed the decision of the Commissioner of the General Land Office of June 12, 1943; rejecting the Santa Fe Pacific Railroad Company's applications, Las Cruces 058331 and 058332, to select certain land in New Mexico in lieu of an equal quantity of land acquired under

the grant of July 27, 1886, and relinquished to the United States pursuant to the act of April 28, 1904. The Santa Fe Company has filed a motion for rehearing, contending that the holding that its selection right accruing under the act of April 28, 1904, was extinguished by the releases filed on December 18, 1940, is based upon a fundamental misconception of its rights under that act; that the decision deprives it of vested rights which are distinct and apart from the claims released under the Transportation Act of 1940. Appellant further declares that the decision that the act of 1904 is a grant in aid of the construction of a railroad is a conclusion not justified by the terms of the act and is directly contrary to the decision of the Supreme Court in Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197.

It is not disputed that the release filed by appellant on December 18, 1940, covered all claims to any grant of land in aid of the construction of a railroad from the United States to itself or to any predecessor in interest. Likewise, it is not disputed that the claim now asserted arises under the act of April 28, 1904.

18 In accordance with the provisions of that act, the Santa Fe Company relinquished land to which it was entitled under the grant of July 27, 1866, to aid in the construction of a railroad, and thereby became entitled to select other land within the State of Mexico to replace the land which it had relinquished. It is true, as the decision of January 8, 1944, recognizes, that the Company was not required to relinquish any land included in the grant of July 27, 1866, but because in the act of March 3, 1891, the United States had recognized the validity of the claims of occupants who had been in adverse possession of some of this land for 20 years, it gave the successor in interest of the Atlantic and Pacific Railroad Company an option to relinquish land which was occupied by such settlers and promised to permit the Company to select other land in lieu of the relinquished land. It is apparent, therefore, that any land acquired by the Santa Fe Company under the act of April 28, 1904, was a substitute for land granted by the act of July 27, 1866, in aid of the construction of its railroad. Consequently any land claimed under the 1904 act is also in aid of the construction of a railroad and is, therefore, included in the release filed on December 18, 1940.

In Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197, and United States ex rel. Santa Fe Pac. R. Co. v. Work, 4 F. (2d) 172, the courts determined nothing more than that in approving or disapproving a selection under the act of 1904, the Secretary of the Interior is required to consider the status of the lands at the time of the selection without reference to facts subsequently discovered. The Supreme Court recognized that "the moment that lands were relinquished at the request of the Secretary a contract

was made, and the government was bound to convey such vacant lands within the territory as the company should select * * *" (259 U. S. 199), but there is nothing in either of these decisions which supports appellant's contention that the act of 1904 was not a granting act. Moreover, the courts have recognized a contractual relationship between the United States and the grantees of the railroad grants. The existence of a contractual relationship is not, therefore, a characteristic of the act of 1904 which distinguishes it from the railroad grants. By filing its release of all claims under any grant of land in aid of the construction of a railroad, the Santa Fe Company relinquished its contractual right to the selected land in exchange for the benefits of the Transportation Act. It cannot escape the consequences of such action.

The motion for rehearing is denied.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

* * * * * *

In United States District Court

Motion to dismiss

Filed July 12, 1944

The defendants move the court to dismiss the action because the complaint fails to state a cause of action upon which relief can be granted.

Dated July 11, 1944.

FOWLER HARPER,
Solicitor,
Department of the Interior,
HARRY M. EDELSTEIN,
Assistant Solicitor,
Department of the Interior,
Attorneys for Defendants.

* * * * * *

In United States District Court

Memorandum opinion

Filed Dec. 4, 1944

These are motions to dismiss, which were argued together. They raise similar questions of law and can be conveniently consolidated for decision.

Plaintiff prays in each case for a judgment enjoining defendants from rejecting selections of lands filed by it on the ground that they are barred by a release filed pursuant to Sec. 321 (b) of the Transportation Act of 1940, 49 U. S. C. 65, and directing defendants to determine the rights of plaintiff in said selections, without regard to the release.

In Civil Action 2373 the facts alleged are briefly as follows: *Plaintiff's predecessor* in title acquired certain lands in New Mexico under the Act of July 27, 1866, 14 Stat. 292.[1]

By deed dated December 18, 1911, plaintiff relinquished these lands to the United States under the Act of April 28, 1904, 33 Stat. 556.[2] On August 28, 1940, it exercised its rights of selection under the Statute last named, by selecting lands in lieu of the relinquished lands, and on December 18, 1940, while the selections were still pending, filed the release above mentioned.

In Civil Action 2384[5] the facts alleged are briefly as follows:

Plaintiff's predecessor in title acquired certain lands in Arizona under the Act of July 27, 1886, supra. By deed dated November 27, 1916, and December 15, 1916, plaintiff relinquished these lands to the United States under the Act of June 22, 1874, 18 Stat. 194; 43 U. S. C. 888.[3] On March 23, 1943,

[1] "SEC. 3. And be it further enacted, that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office. * * *"

[2] "That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

[3] "That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes. And provided further, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a preemption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market."

plaintiff exercised its rights of selection under the Statute last named, by selecting lands in lieu of the relinquished lands. On December 18, 1940, plaintiff filed the release above mentioned.

The release filed by plaintiff pursuant to the Transportation Act of 1940, supra, stated that it

relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

The Transportation Act of 1940, supra, in paragraph (a) of Section 321 thereof, makes certain concessions to carriers in the rates, fares, and charges applicable to the transportation of persons, property, and mail for the United States, and paragraph (b) thereof provides that,

If any carrier by railroad furnishing such transportation,
22 or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) f this section had not been enacted until such such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid.

The issue therefore is whether the release embraces, and thereby extinguishes, the right to select lands in lieu of relinquished lands under the Acts of 1904 and 1874, supra, respectively.

The release embraces any and all claims of whatever description to lands and interests therein granted by any Act of Congress to plaintiff or any predecessor in aid of the construction of any portion of its railroad.[4] Plaintiff's right to select lieu lands is a claim to lands, and this is not disputed. Plaintiff does contend, however, that it is not a claim to lands granted by any Act of Congress in aid of construction: that is, that the Acts of 1904

[4] The release excludes lands which have been patented or certified to plaintiff or any predecessor in aid of construction, and other categories of lands not material to this case.

and 1874, supra, are not granting acts in aid of construction, and therefore that such claim is not included in the release.

The Act of 1866, supra, under which plaintiff's predecessor acquired title to the lands relinquished, is concededly a granting act in aid of construction.[3] The Acts of 1904 and 1874, supra, are supplemental to, and in legal effect amendatory of, the
23 Act of 1866, supra. They made provision for the relief of settlers who were found to be occupying the lands of the railroad company. They gave the railroad company the right to select equal quantities of lands in lieu of lands which they relinquished for the benefit of such settlers. They were measures found to be desirable by reason of unforeseen developments arising out of the operation of the railroad land grant acts. The plaintiff itself probably was not without selfish motive in the relinquishment of its lands, which tended to prevent an exodus of established settlers along its right of way who without conscious fault found themselves without title.

As I perceive the intent of Congress, from the language of the statutes themselves, the lieu lands, when selected, were to be, so far as humanly possible, a counterpart of, and in substitution for, the original lands granted, and were to be lands granted by Congress in aid of construction, precisely as were the original lands. The Act of 1904, supra, gives the right to select public lands "of equal quality" and contemplates a substitution of section for section. The Act of 1874, supra, gives the right to select "an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they [railroad grantees] shall receive title the same as though originally granted."

The three Acts are each a part of the same legislative scheme and purpose to grant lands in aid of construction of railroads. The subsequent Acts are not independent granting Acts without relation to any other grant, but are clearly dependent upon, and supplemental to, the grant contained in the Act of 1866, supra, and provide for grants contingent upon the relinquishment of lands granted under such Act. In other words, the Acts of 1904 and 1874, supra, are, respectively, granting Acts in aid of construction when coupled, as they must be, with the Act of 1866, supra.

The fact, as contended by plaintiff, that it gave a consideration, namely, a deed to the lands relinquished, for the
24 right to select others, does not make either of the Acts

[3] Santa Fe Pac. R. R. Co. v. Work, 267 U. S. 511, 69 L. ed. 764.

any less a grant. A railroad land grant is not a gift, but is a transfer of title to lands in return for the construction and operation of a railroad.[6] Nor, as urged by plaintiff, does the fact that plaintiff's rights are contractual [7] remove the applicable statutes from the category of granting statutes.[8]

Under these circumstances, I am of the opinion that these unperfected rights of plaintiff to select lieu lands are claims to lands granted by Acts of Congress to plaintiff in aid of the construction of its railroad, and are therefore within the scope of, and extinguished by, the release, which was given in pursuance of an apparent Congressional purpose to wipe the slate clean of such claims by any railroad who enjoyed the benefits of the rate concessions made by the Transportation Act of 1940.

The motion to dismiss will therefore be granted. Counsel will prepare and submit on notice order in accordance herewith.

DAVID A. PINE, *Justice.*

DECEMBER 4, 1944.

25

In United States District Court

Final judgment

Filed Dec. 12, 1944

This cause came on to be heard on defendants' motion to dismiss on the ground that the complaint fails to state a cause of action upon which relief can be granted.

It is this 12th day of December 1944, ordered that the motion be and the same is hereby granted and the complaint be and the same is hereby dismissed on the merits.

DAVID A. PINE, *Justice.*

No objection to form.

LAWRENCE CAKE,
Attorney for Plaintiff.

[6] Burke v. Sou. Pac. R. R. Co., 234 U. S. 669, 680.
[7] Santa Fe Pac. R. R. Co. v. Fall, 259 U. S. 197. U. S. ex rel Santa Fe Pac. R. R. Co. v. Work, 55 U. S. App. D. C. 206, 4 F. 2d 172.
[8] Burke v. Southern Pac. R. R. Co., supra. United States v. Northern Pac. Ry. Co., 256 U. S. 51 (1921). Southern Pac. Co. v. United States, 307 U. S. 393, 396 (1939).

27 In the United States Court of Appeals, District of Columbia

No. 8957

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

v.

HAROLD L. ICKES, OSCAR L. CHAPMAN, FRED W. JOHNSON, APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Joint appendix

In United States District Court

Complaint for injunction and relief in the nature of mandamus.

Filed April 13, 1944

1. Plaintiff, Santa Fe Pacific Railroad Company, is a corporation created and organized under the Act of March 3, 1897, c. 374, 29 Stat. 622, and sues in its own right and as lawful
28 successor to the Atlantic and Pacific Railroad Company, a corporation created and organized under the Act of July 27, 1866, c. 278, 14 Stat. 292.

2. The defendants are residents of the District of Columbia, the defendant Harold L. Ickes being Secretary of the Interior and as such charged by law with the administration of the laws of the United States relating to public lands, the defendant Oscar L. Chapman being Assistant Secretary of the Interior and charged with like duties under the direction of the Secretary and in particular with the supervision of the General Land Office, and the defendant Fred W. Johnson being Commissioner of the General Land Office and charged by law with the administration of that office under the supervision and direction of the Secretary and Assistant Secretary of the Interior. The said defendants are sued individually and in view and because of acts done or threatened by them under color of their offices and authority.

3. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $3,000, and involves the construction of certain laws of the United States under which plaintiff claims vested rights in and to certain public lands, and the duties of the

defendants, respectively, to determine plaintiff's rights in and to the lands in question and plaintiff's right to a patent to the said lands, upon a proper construction of the laws under which plaintiff's rights are claimed, and without regard to a certain release executed by plaintiff and filed with the defendant the Secretary of the Interior, as hereinafter more particularly stated.

4. Plaintiff, Santa Fe Pacific Railroad Company, is successor to the Atlantic and Pacific Railroad Company and to the land grant to the latter company under the Act of July 27, 1866, c. 278, 14 Stat. 292, and is fully vested with all the rights of the Atlantic and Pacific Railroad Company under the said Act of July 27, 1866, in and to the lands thereby granted.

5. Included in the lands so granted, and acquired and owned by plaintiff as successor to the Atlantic and Pacific
29 Railroad Company, prior to November 27, 1916, were the following described lands in Arizona, to wit:

NE¼NE¼, sec. 13, T. 15 N., R. 13 W., G. & S. R. M.
NW¼NE¼, sec. 13, T. 15 N., R. 13 W., G. & S. R. M.
SE¼NE¼, sec. 13, T. 15 N., R. 13 W., G. & S. R. M.
NE¼SW¼, sec. 27, T. 16½ N., R. 13 W., G. & S. R. M.
SE¼SW¼, sec. 27, T. 16½ N., R. 13 W., G. & S. R. M.
SE¼SE¼, sec. 11, T. 15 N., R. 13 W., G. & S. R. M.

being lands within the primary limits of the said grant, title to which vested in plaintiff's predecessor, the Atlantic and Pacific Railroad Company, as of March 12, 1872, upon the definite location of the said railroad.

6. April 29, 1916, by letters of that date, designated Phoenix 019940 and Phoenix 024256, and December 5, 1916, by letter of that date designated Phoenix 019426–026935, the Commissioner of the General Land Office requested plaintiff to relinquish to the United States, under the Act of June 22, 1874, 18 Stat. 194, among other lands, the said lands described in paragraph 5, supra.

7. Thereafter, by deeds of relinquishment dated November 27, 1916, and December 15, 1916, plaintiff conveyed and relinquished to the United States, among other lands, the said lands described in paragraph 5 supra.

8. March 2, 1917, and May 25, 1917, by letters of those dates, the Commissioner of the General Land Office accepted the said relinquishments and advised plaintiff that it would be allowed upon proper application to select other lands in lieu of the lands relinquished, in accordance with the rules and regulations under the said Act of June 22, 1874.

9. Thereafter, March 23, 1943, plaintiff exercised the rights of selection, based on the relinquishment of the lands described in

paragraph 5 supra, by filing selections under the said Act of June 22, 1874, of the following described lands, to wit:

SE¼SE¼, sec. 10, T. 17 N., R. 9 W., G. & S. R. M.
SW¼SE¼, sec. 10, T. 17 N., R. 9 W., G. & S. R. M.
NW¼NE¼, sec. 15, T. 17 N., R. 9 W., G. & S. R. M.
NE¼NE¼, sec. 15, T. 17 N., R. 9 W., G. & S. R. M.
NE¼SW¼, sec. 13, T. 17 N., R. 9½ W., G. & S. R. M.
NW¼SE¼, sec. 13, T. 17 N., R. 9½ W., G. & S. R. M.

in lieu of the said lands described in paragraph 5 supra. The said selections were filed in the local land office of the Department of the Interior, at Phoenix, Arizona, in accordance with the regulations of the Department of the Interior, being designated as Phoenix 080805, 080806, 080807, 080808, 080809, and 080810, and in due course were forwarded to the General Land Office for further action.

10. May 15 and May 22, 1943, by decisions of the Commissioner of the General Land Office of those dates, plaintiff was notified that in view of a certain release filed by plaintiff with the Secretary of the Interior, on December 18, 1940, pursuant to section 321 (b), Title III, Part II, of the Transportation Act of 1940, approved September 18, 1940, c. 722, 54 Stat. 954, a copy of which is attached hereto and made part hereof, marked Exhibit A, plaintiff had no further rights under the Act of June 22, 1874, and that the said selections, Phoenix 080805-080810, would be rejected.

11. Thereafter, and within thirty days from the dates of the said decisions of the Commissioner of the General Land Office, in accordance with the regulations and rules of practice of the Department of the Interior, plaintiff appealed to the Secretary of the Interior from the said decisions rejecting the said selections.

12. January 8, 1944, in two decisions of that date, the defendant Oscar L. Chapman, as Assistant Secretary of the Interior, acting for the defendant the Secretary of the Interior, affirmed the decisions of the Commissioner of the General Land Office rejecting the said selections.

13. January 18, 1944, plaintiff filed with the Secretary of the Interior a motion for rehearing. February 8, 1944, plaintiff's motion for rehearing was denied by the defendant the Assistant Secretary of the Interior.

14. Plaintiff avers that its right under the Act of June 22, 1874, to select other lands, in lieu of the lands relin-
31 quished and quitclaimed to the United States as hereinabove stated, was and is a contractual right derived from the said Act of June 22, 1874, and the relinquishment of the base

lands above described; that plaintiff has fully performed its obligation under the said contract; that the lands so relinquished to the United States have not been designated or used as base for any other selections; that plaintiff is entitled to the lands selected subject to the approval of the Secretary of the Interior upon a determination that the said lands are "public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection" within the terms of the said Act of June 22, 1874; that the release described in paragraph 10 supra does not apply to and does not include rights of selection under the said Act of June 22, 1874, because it is a release of claims to lands, or interests therein, granted to plaintiff or its predecessor in interest in aid of the construction of any portion of its railroad, whereas plaintiff's rights under the said Act of June 22, 1874, are of a different character and not derived from any grant to plaintiff or its predecessor; that in rejecting the selections on the ground that approval thereof is barred by the said release the defendants have acted on an erroneous construction of the law and have gone beyond the authority and powers conferred upon them by law and have arbitrarily disregarded and departed from their duty to approve the said selections if found to be otherwise valid and in accord with the law and regulations.

15. Plaintiff further avers that the action of the defendants in rejecting the said selections on the ground stated and in denying plaintiff's right to a patent to the lands selected is in violation of plaintiff's vested rights in and to the said lands and casts a cloud on plaintiff's title and right thereto; that plaintiff has exhausted all remedies, by appeal or otherwise, in the Department of the Interior, and that its only remaining remedy is by application to this court for a decree enjoining the defendants from re-
32 jecting the said selections on the ground stated, and directing the defendants to determine plaintiff's right to the approval of the said selections without regard to the release filed by plaintiff pursuant to section 321 (b) of the Transportation Act of 1940; that unless such relief is granted plaintiff will be wholly denied and deprived of its rights under the said Act of June 22, 1874, in violation of the law and of the terms of the said contract, and will suffer loss and injury for which it has no other remedy whatever.

Wherefore, the premises considered, plaintiff prays:

1. For a temporary restraining order or injunction, pendente lite, and upon final hearing a decree, enjoining the defendants from rejecting the said selections filed by plaintiff under the Act of June 22, 1874, on the ground that they are barred and all rights of the plaintiff therein extinguished by the release filed pursuant to section 321 (b) of the Transportation Act of 1940; and directing

the defendants to determine the rights of the plaintiff in the said selections and to the lands selected, without regard to the said release.

2. For such other and further relief as the case may require and may be necessary and appropriate.

SANTA FE PACIFIC RAILROAD COMPANY,
By LAWRENCE CAKE, *Attorney.*

DISTRICT OF COLUMBIA:

I, Lawrence Cake, being duly sworn depose and say, that I am the attorney for Santa Fe Pacific Railroad Company, a corporation, that I have read the foregoing complaint, and that I verily believe the facts therein stated to be true.

LAWRENCE CAKE.

33 Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 6th day of March, 1944.

[SEAL] ALMA B. NEWELL, *Notary Public.*

LAWRENCE CAKE,
717 National Press Building, Washington, D. C.,
Attorney for Plaintiff.

* * * * *

Defendants' Exhibit 1

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY.
Washington, January 8, 1944.

A. 23679.

SANTE FE PACIFIC RAILROAD COMPANY:

"F"

Phoenix 080809, 080810.

Applications for land in lieu of railroad land grant rejected. Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of May 15, 1943, rejecting application, Phoenix 080809, for selection of the NE¼SW¼ Sec. 13, T. 17 N., R. 9½ W., G. & S. R. B. & M., Arizona, in lieu of the SE¼SW¼ Sec. 27, T. 16½ N., R. 43 W., G. & S. R. B. & M., Arizona, and Phoenix 080810, for the NW¼SE¼ Sec. 13, T. 17 N., R. 9½ W., G. & S. R. B. & M., Ari-

zona, in lieu of the SE¼SE¼ Sec. 11, T. 15 N., R. 13 W., G. & S. R. B. & M., Arizona.

The Atlantic and Pacific Railroad Company was named as grantee of a congressional land grant in aid of the con-
34 struction of its railroad in the act of July 27, 1866 (14 Stat. 292). The Santa Fe Pacific Railroad Company, hereinafter referred to as the Santa Fe Company, purchased the property of the Atlantic and Pacific Railroad Company at a foreclosure sale and Congress confirmed the grant of July 27, 1866, to the Santa Fe Company by act of March 3, 1897 (29 Stat. 622). On January 15, 1917, the Santa Fe Company, acting pursuant to the act of June 22, 1874 (18 Stat. 194, 43 U. S. C. sec. 888), relinquished to the United States certain portions of this grant then occupied by settlers whose entries had already been allowed. The relinquishment was accepted and on March 2, 1917, the Commissioner of the General Land Office informed the Santa Fe Company that it had a right to select other land within the limits of the grant in lieu of the land relinquished (Miscellaneous No. 67356). This land was then unsurveyed and remained so until about 1939. The official plat of the official survey was accepted by the General Land Office on May 21, 1940.

On December 18, 1940, in accordance with section 321 (b) of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65), and regulations issued thereunder by the Secretary of the Interior (43 C. F. R. 273.61–273.67), the Santa Fe Company and The Atchison, Topeka and Santa Fe Railway Company, operator of the line of railroad, filed releases which provided that each company

"* * * * relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad * * *."

Each release stated that it did not embrace

"* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in
35 selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

The releases were approved March 1, 1941.

On March 23, 1943, the Santa Fe Company filed its selection of the two 40-acre tracts in Sec. 13, T. 17 N., R. 9 W., G. & S. R. B.

& M., claiming the right to select this land in lieu of the land relinquished in 1917, in behalf of the Greene Cattle Company, Incorporated, its transferee, under the provision of the saving clause of section 321 (b) of the Transportation Act of 1940, which permits patenting of lands sold to innocent purchasers for value. It also filed a petition for classification of this land as suitable for stock-watering development under section 7 of the Taylor Grazing act. The Commissioner of the General Land Office rejected the selection on the grounds that the right of selection had been relinquished in the release of December 18, 1940; that a sale to an innocent purchaser had not been shown; and that the selected land had been withdrawn by Executive order of April 17, 1926, creating Public Water Reserve No. 107.

The Santa Fe Pacific Railroad Company has appealed, alleging that its unexercised selection right was not impaired by the release filed on December 18, 1940, for the reason that the release covered only claims under a land grant. It argues that its claim to the selected land does not arise from a land grant and, consequently, was not included in the release; that its unexercised selection right was not included in the release for the further reason that it had been sold to an innocent purchaser for value prior to the effectiveness of the Transportation Act of September 18, 1940; and that its transferee has equities in certain springs of water located on the selected land which entitle the selection to favorable consideration.

36 The act of June 22, 1874, was enacted for the purpose of relieving the hardships of settlers whose filing or entry on public lands had been allowed by the General Land Office under the pre-emption or homestead laws subsequent to the time when the rights of a railroad company under a congressional grant attached to the granted land. It was required because the time when the rights of the grantees in the railroad land grants became vested was often uncertain and ascertained only with difficulty. The granting acts protected settlers whose rights attached prior to those of the grantee and permitted the grantee to replace such losses by selection from the indemnity limits of the grant. The act of June 22, 1874, permitted the grantee to relinquish land in possession of settlers whose rights arose subsequent to its own and to select an equal quantity of land within the limits of the grant not otherwise appropriated in lieu of such land, and provided that the grantee should receive title to land thus selected the same as if it had been originally granted.

The act of August 29, 1890 (26 Stat. 369, 43 U. S. C. sec. 889), gave the grantee railroad companies the same right of selection in cases wherein settlers had resided upon and improved land granted to a railroad company for a period of five years, but whose filings

or entries were not of record. It has no application in this case for the reason that the entries of the settlers on the 40-acre tracts in Sec. 27, T. 16½ N., R. 13 W., and Sec. 11, T. 15 N., R. 13 W., were both of record and were patented in 1914 (Phoenix 019940 and 024256).

It is apparent that the act of June 22, 1874, contemplates a grant of land to a railroad company antedating the passage of this act. The act gives the grantee an option to relinquish a portion of land included in the earlier grant to which its rights had attached, but which was in the possession of settlers. Harris v. Northern Pacific R. R. Co., 10 L. D. 264; Southern Pacific Railroad Company, 33 L. D. 89. If the option to relinquish is exercised,
37 the grantee may then select other land, in lieu of the land relinquished within either the primary or the indemnity limits of the original grant. Southern Pacific R. R. Co., 18 L. D. 275; The Gulf and Ship Island R. R. Co. v. The United States, 22 L. D. 560; Dressel v. Oregon and California R. R. Co., 35 L. D. 21. It is true that the selected land contemplated by this act is land which was not granted to the railroad company in the original grant, but the act of June 22, 1874, is in itself a granting act from which arises the right to the land selected in lieu of land included in the original grant. The act specifically provides that railroad companies which exercise the option to select land in lieu of land relinquished pursuant to this act, "shall receive title" to the selected land "the same as though originally granted." This is a declaration of an additional grant in lieu of a portion of the original grant.

Further, it creates a right of the same dignity as the indemnity provisions of the granting acts. It has never been denied that claims to indemnity land arise out of the provision of the original grant which gives the grantee a contingent right to such land by permitting it to select land within the indemnity limits of the grant to replace losses of land specifically granted. The act of June 22, 1874, gives the grantee of the original grant a right to select land within either the primary limits or the indemnity limits of the grant in lieu of losses within the primary limits which are not covered by the indemnity provisions of the original grant. The act of June 22, 1874, is, therefore, but an extension of the indemnity right previously given. The land is referred to as lieu land rather than indemnity land for the purpose of emphasizing the distinction in the occasion for exercise of the right of selection, but the act creating this right is as truly a granting act as the original act.

It is not material that the act of June 22, 1874, may have created a contract right to select land in lieu of land relinquished.
38 The Supreme Court has held that all of the railroad land

grants constituted offers to convey title to public lands to certain railroad companies who would build railroad lines, which ripened into contracts when the railroads indicated their acceptance of the offers by filing plats of the lines which they proposed to build. Under these circumstances, the existence of a contract right to select lands in lieu of land relinquished does not prove that the act under which the contract right is claimed does not constitute a grant. It suggests rather that the purpose and result accomplished by this act are the same as the purposes and results of the original granting acts.

We conclude, therefore, that the act of June 22, 1874, is a granting act and that the right to select, which the Santa Fe Company now seeks to exercise is a claim arising under that act. The release of December 18, 1940, covers any and all claims arising under "any act of Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest," and not merely the original grant of July 27, 1866. It follows that all claims arising under the grant of 1874 were relinquished by this release.

If, as appellant contends, the right to select land in lieu of land relinquished which was bestowed by the act of June 22, 1874, is not a right which arises out of a railroad land grant and is not covered by a release filed pursuant to the Transportation Act of 1940, it is clear that it cannot be excepted from the operation of such release by the saving clauses of section 321 (b) of the Transportation Act. Appellant is somewhat inconsistent in relying upon both contentions, but inasmuch as the Department has determined that the right of selection does arise under a railroad land grant and was therefore necessarily included in the release of December 18, 1940, it will consider whether or not it was excepted from the release under the second provision of the saving clause of section 321 (b) of the Transportation Act, which provides:

"* * * Nothing in this section shall be construed * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier [the grantee] to an innocent purchaser for value * * *"

Appellant has recognized that the saving clause of section 321 (b) does not operate automatically without any designation of land to be excepted from a release, by filing with its release in the General Land Office a list of lands and the purchasers to whom it alleged that it had sold them prior to the effectiveness of the Transportation Act. This list did not include the land in the present selection list. Further, it did not submit with its selection list proof that the Greene Cattle Company, Incorporated, is a purchaser entitled to the estate in land claimed in the selection list which was filed instead of an application for patent. The regula-

tions of December 10, 1941 (43 C. F. R. 273.68–273.74), require that such proof shall be submitted with an application for patent. Appellant's claim that its right to select should be recogized under the saving clause of section 321 (b) rests upon the mere assertion that the Greene Cattle Company, Incorporated, is a transferee of this right. This is insufficient to clothe it with the rights of an innocent purchaser under the Transportation Act.

In any event, the bona fide purchaser provision of the Transportation Act is not applicable to the transfer of a railroad company's unexercised right to select land. Santa Fe Pacific Railroad Company, A. 23646, decided today.

In view of the fact that the record shows both a relinquishment of the right sought to be exercised, in the release filed on December 18, 1940, and failure to bring the claim within the saving clause of the Transportation Act, a determination that the Greene Cattle Company, Incorporated, has equities in certain springs of water located on the land sought to be selected cannot affect the decision in this case. Accordingly, we do not examine that question.

The decision of the Commissioner is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

40 *Defendants' exhibit 2*

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, January 8, 1944.

A. 23684.

SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Phoenix 080805, 080806, 080807, 080808.
Lieu indemnity selection rejected.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

On December 18, 1940, the Santa Fe Pacific Railroad Company, successor in interest to the grant to the Atlantic and Pacific Railroad Company under the act of July 27, 1866 (14 Stat. 292), and the Atchison, Topeka and Santa Fe Railroad Company, operator of the line of railroad, filed in the General Land Office releases of all claims to lands under said grant in accordance with section 321 (b), Part II, Title III of the Transportation Act of September 18, 1940 (54 Stat. 954, 49 U. S. C. sec. 65), and regulations of October 10, 1940 (43 C. F. R. 273.61–273.67). The text of said section 321 (b) is as follows:

"If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States
41 to land, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

The release filed by the Santa Fe Pacific Railroad Company, relinquished, remised and quitclaimed to the United States:

"* * * any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad."

It excepted from the release only:

"* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

42 On March 23, 1943, John H. Page and Company by authority of the Santa Fe Pacific Railroad Company filed lieu indemnity selections under the acts of June 22, 1874 (18 Stat. 194, 43 U. S. C. sec. 888), and August 29, 1890 (26 Stat. 369, 43 U. S. C.

sec. 889), Phoenix 080805 to 080808, inclusive, accompanied by petitions to classify the lands selected under section 7 of the Taylor Grazing Act. The affidavits supporting the petition for classification stated that the beneficiary under the selection is the Greene Cattle Company, Incorporated, and in a letter of John H. Page and Company to the register it is stated that "These selection rights were purchased from Santa Fe Pacific Railroad Company many years ago."

The Commissioner of the General Land Office by decision of May 22, 1943, rejected the selections on the ground that the right to make them had been released by the Santa Fe Pacific Railroad Company. The Commissioner stated:

"Other than the statement of John H. Page and Company in their letter to the Register, supra, that these selection rights were purchased from the railroad company many years ago, there is with the record no evidence of a sale. The exception in section 321b profects certain sales of lands to innocent purchasers for value. It does not protect a sale of mere rights of selection, at the most in the nature of floats, not attached to any tracts and which may never be exercised, the filing of a selection being presumably at the option of the purchaser. As no land was sold, these transactions do not come within the protection of this exception.

"The theory back of the filing of selections 080805 to 080808, inclusive, may be that the railroad company's rights under the acts of 1874 and 1890 were not in fact released. The releases, in conformity with the Transportation Act and the regulations, are broad and include all rights and claims pursuant to, growing out of, or arising from the grants except the three types of claims specifically excluded therefrom, above-mentioned, relative to patented, clear listed, and sold lands. All outstanding unused selection rights under these acts were released. Such rights may not now be asserted as a basis for the acquisition of public lands."

John H. Page and Company, as agents for the selector, have appealed. Under various forms of statement their contention is that the outstanding unused selection rights under the acts of 1874 and 1890 which had been sold by the Santa Fe Pacific Railroad Company prior to September 18, 1940, to innocent purchasers for value, were not owned or claimed by said company and were not released by the company but are protected by the exception in section 321 (b) of the Transportation Act.

The appeal is supported by an affidavit executed by John H. Page, senior partner of the firm of John H. Page and Company, which, among other things, states that the said firm in September 1932 purchased from Hugo Seaberg, of Raton, New Mexico "for

a valuable consideration the selection rights of the Santa Fe Pacific Railroad Company under the acts of 1874 and 1890, as follows:" Then follows a description of the base land offered in exchange for the land selected in the above-mentioned applications. It is further stated, in substance, that Seaberg requested W. B. Collinson, Land Commissioner of Santa Fe Pacific Railroad Company, to record John H. Page and Company "as owners of the above rights;" that the applications to select were signed by Collinson, the Land Commissioner, and that thereafter, he being deceased, the affiant requested E. O. Hemenway, the Land Commissioner of said railroad company, to furnish John H. Page and Company with the new applications to select to take the place of those signed by Collinson, and new applications were signed by Hemenway and forwarded to John H. Page and Company on July 27, 1937, and these applications are the ones used in support of the applications Phoenix 080805-080808.

In the showings of appellant as to its transactions relating to the selections with Page and Company, no sale of the
44 right of selection to them is discerned. If the application to select had been made by Page and Company as an assignee or transferee of the railroad grantee, it would have been under the rules and practice of the Department forthwith rejected. The Department does not undertake to determine whether an applicant for selection other than the railroad grantee is a successor in interest to the land grant rights, and in the absence of legislation or judicial recognition of such applicant as a successor in interest patents under the grant are issued to the grantee company. Southern Pacific Land Company, 42 L. D. 522. And in the administration of such grants the Department always deals with the grantee itself and not with parties claiming to be in privity with it, as the granting act does not confer on it jurisdiction to determine the relations between the grantee company and private individuals. Perrin v. Santa Fe Pacific Railroad Company, 43 L. D. 467.

The most that can be said from the nature of the showings is that the Santa Fe Pacific Railroad Company for a valuable consideration promised to exercise its right of selection at the instance and for the benefit of Page and Company as to such lands as the latter might designate, and upon the perfection of the selection or upon issuance of patent to the grantee to convey the land to Page and Company or to whom the contract had been assigned. But regardless of whether the selection right is assignable and the transaction here alleged may be considered as such an assignment, it is obvious the railroad company could not assign any more right than was conferred upon it by law.

As said in Southern Pacific Railroad Company, 53 L. D. 211, 213, "The Supreme Court has repeatedly held in substance that the

granting acts conferred no rights to specific tracts within the indemnity limits until the grantee's right of selection had been exercised." In Clark v. Herington, 186 U. S. 206, 209, the court said:

"* * * and it is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that
45 up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in Kansas Pacific Railroad v. Atchison Railroad, 142 U. S. 414, 421: 'Until selection was made the title remained in the government, subject to its disposal at its pleasure.' See, also, Ryan v. Railroad Company, 99 U. S. 382; Grinnel v. Railroad Company, 103 U. S. 739; Cedar Rapids &c. Railroad v. Herring, 110 U. S. 27; St. Paul Railroad v. Winona Railroad, 112 U. S. 720, 731; Barney v. Winona &c. Railroad, 117 U. S. 228, 232; Sioux City Railroad v. Chicago Railway, 117 U. S. 406, 408; Wisconsin Railroad v. Price County, 133 U. S. 496, 511; United States v. Missouri &c. Railway, 141 U. S. 358, 375; Hewitt v. Schultz, 180 U. S. 139; Southern Pacific Railroad Company v. Bell, 183 U. S 675."

In Ryan v. Railroad Company, 99 U. S. 382, 388, the court in speaking of the land there in contest held that "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose * * *" Later cases recognizing this doctrine have described the right of selection of indemnity lands as a power, and held that no color of title is gained until the power is exercised. United States v. Southern Pacific Railroad Company, 223 U. S. 565, 579. And the right is dependent upon a future contingency. Northern Pacific Railroad Company v. Lane, 46 App. D. C. 434, 439.

It is manifest that the land sought here to be selected does not fall with the categories of section 321 (b) of patented or certified land or of lands listed or selected and finally and fully approved, but it is in effect contended that they are in the class of "such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value."

It is not questioned that the right of selection is a valuable property right, such a right as might be sold or encumbered (Myers v. Croft, 13 Wall. 291), as has been frequently done by grantee
46 companies and would entitle the assignee to the indemnity lands within the grant, when title thereto is perfected under the grant. Hastings and Dakota Ry. Co., 18 L. D. 511-518. The contract, however, to sell the lands intended to be acquired was entirely executory. The assignor had under the rulings above cited no right, interest or claim to any specific land, and therefore, could not convey any interest in them. The Secretary could not

rightly find that the agreement of the railroad company to exercise its right of selection to lands thereafter to be specified was a sale of lands to a bona fide purchaser within the meaning of the statute. The railroad company elected to surrender its rights of selection by releasing the land in conformity with the provisions of the transportation act, and, therefore, relinquished its power to select the lands in question. See Santa Fe Pacific Railroad Company, A. 23646, decided this day.

The decision of the Commissioner is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

Defendants' Exhibit 3

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, February 8, 1944.

A. 23679.
A. 23684.
SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Phoenix 080805, 080806, 080807, 080808, 080809, 080810.
Applications for selection of lieu lands rejected.
Motion denied.

MOTION FOR REHEARING

* * * * *

On January 8, 1944, the Department affirmed the decisions of the Commissioner of the General Land Office, re-
47 jecting the Santa Fe Pacific Railroad Company's applications to select certain tracts of land in Arizona in lieu of an equal quantity of land acquired under the grant of July 27, 1866, which it had relinquished to the United States pursuant to the act of June 22, 1874. The Company has filed motions for rehearing, contending that the departmental decisions are based on a misconception of its rights under the act and that they deprive it of vested rights which are distinct and apart from the claims released under the Transportation Act of 1940. This contention is attempted to be supported by the argument that the act of 1874 is not a granting act and that claims arising from it were not relinquished by the Company's release of all claims to any grant of land, to itself or any predecessor in interest, in aid of the construction of a railroad.

The departmental decision of January 8, 1944 (A. 23679), pointed out that because the act of June 22, 1874, provides for a

substitution of land to be selected from the land not specifically granted but within the limits of the grant of July 27, 1866, for land which was specifically granted by that act in aid of the construction of a railroad, and subsequently relinquished by the voluntary act of the railroad company, it is a granting act. Appellant has offered nothing which in any way lends support to its reiterated contention that the act of June 1874 is not a granting act. In Santa Fe Pacific R. Co. v. Work, 267 U. S. 511 and Santa Fe Pacific R. Co. v. Work, 54 App. D. C. 161, the court held merely that a definition of minerals in the original grant of July 27, 1866, which excluded coal and iron, could not be applied to the act of June 22, 1874. The courts thus recognized that the act of 1874 is separate and distinct from the grant of 1866 and that it affords a method of acquiring title to public land upon different terms. It is significant that in the excerpt from the decision of the Court of Appeals quoted in appellant's brief, the court refers to the grant of 1866 as "the original grant." Obviously, if there were
48 no other grant, it would be inappropriate to speak of an "original" grant. It is apparent, therefore, that the decisions upon which appellant relies do not support its theory.

Appellant's further contention that the act of 1874 created a contract relationship between itself and the United States is immaterial. Under the theory of the railroad land grants announced by the Supreme Court in Burke v. Southern Pacific R. R. Co., 234 U. S. 669, and reiterated in numerous decisions, the act of 1874 constituted an offer to convey to the railroad a quantity of land equal to the quantity of land previously granted to it which it should relinquish to the United States for the benefit of settlers. A contract resulted when appellant filed its relinquishment to certain tracts of granted land and the United States became bound to convey an equal quantity of land. But appellant had no title to any land and could acquire none until it had perfected its inchoate right by selecting specific sections of land. Having filed its selections, appellant was undoubtedly entitled to receive patent to all of the selected land which was then available for disposition. But by filing its release before the selection was approved, it divested itself of all claims to such land except such as were included in the exceptions recognized in the saving clause of section 321 (b) of the Transportation Act of 1940. The saving clause recognizes only such selections as have been fully and finally approved by the Secretary. Hence, the contractual relationship between the United States and appellant did not prevent appellant from voluntarily relinquishing its right to receive patent to the land which it had selected in exchange for the benefits of the Transportation Act. The plain terms of the statute defining the

nature of the releases which the railroad companies were permitted to file, clearly includes the claim appellant now asserts and appellant was charged with notice of that fact. Appellant
49 was not required to file such release, but it chose to do so in order to receive the benefits of the Transportation Act. It cannot now escape the consequences of such action.

The motion for rehearing is denied.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

In United States District Court

Motion to dismiss

Filed July 12, 1944

The defendants move the court to dismiss the action because the complaint fails to state a cause of action upon which relief can be granted.

FOWLER HARPER,
Solicitor,
Department of the Interior,
HARRY M. EDELSTEIN,
Assistant Solicitor,
Department of the Interior,
Attorneys for Defendants.

Dated July 11, 1944.

In United States District Court

Final judgment

Filed Dec. 12, 1944

This cause came on to be heard on defendants' motion to dismiss on the ground that the complaint fails to state a cause of action upon which relief can be granted.

It is this 12th day of December 1944, ordered that the motion be and the same is hereby granted and the complaint be and the same is hereby dismissed on the merits.

DAVID A. PINE, *Justice.*

No objection to form.

LAWRENCE CAKE,
Attorney for Plaintiff.

51 In United States Court of Appeals, District of Columbia

No. 8956, October Term, 1945

No. 8957, October Term, 1945

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

vs.

HAROLD L. ICKES ET AL., APPELLEES

Minute entry

Nov. 13, 1945

On motion of Mr. Harry M. Edelstein, Mr. Ernest F. Hom of the Bar of the Supreme Court of California was allowed to argue for Appellee Harold L. Ickes pro hac vice by special leave of Court.

Argument commenced by Mr. Lawrence Cake, attorney for appellant, concluded by Ernest F. Hom, attorney for appellees.

* * * * *

53 In United States Court of Appeals, District of Columbia

No. 8956-7

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR; OSCAR L. CHAPMAN, ASSISTANT SECRETARY OF THE INTERIOR; FRED W. JOHNSON, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Argued November 13, 1945—Decided February 4, 1946

Mr. Lawrence Cake for appellant.

Mr. Ernest F. Hom, Principal Attorney, Office of the Solicitor, Department of Interior, of the Bar of the Supreme Court of California, pro hac vice, by special leave of Court, with whom Mr. Harry Edelstein, Assistant Solicitor and Mr. Sidney B. Jacoby, Senior Attorney, Department of Interior, were on the brief, for appellees.

Before GRONER, C. J., CLARK and PRETTYMAN, JJ.

Opinion

CLARK, J.: The Santa Fe Pacific Railroad Company brought two actions in the District Court requesting relief by way of injunction and mandamus to compel the Secretary of the Interior to determine the Railroad's right to certain lands selected in accordance with Acts of 1874[1] and 1904[2], without regard to the release executed by the Santa Fe under Title III, Part II, § 321 of the Transportation Act of 1940.[3] The District Court dismissed both complaints on the merits.[4]

54 The Santa Fe's predecessor in interest, the Atlantic and Pacific Railroad Company, had received lands under an "aid of construction" granting act enacted in 1866.[5] Section 3 of that Act provided for the basic grants to Santa Fe's predecessor, and gave the railroad the right to select indemnity lands where lands within the primary limits of the grant "shall have been granted, sold, reserved, occupied by homestead settler, or preempted, or otherwise disposed of * * *", as well as the right to select agricultural lands in substitution for reserved mineral lands within the original grants. No rights involving these "indemnity" lands are in controversy here. However, it later developed that subsequent to the time when the railroad's rights attached to particular lands under the 1866 Act some of the original grants came into the possession of settlers whose entry or filing was allowed under the preemption or homestead laws. The United States, desiring to confirm title to such lands in the homesteaders, passed Acts in 1874 and 1904 permitting the railroad, when requested to do so by the Secretary of the Interior, to reconvey to the government land, as to which title had vested in the railroad, thus making it possible for the government to perfect title in the later claimants.[6] In consideration for the reconveyances under these Acts the railroad gained the right to select "lieu" lands to replace those given up. The controversy here

[1] Act of June 22, 1874, c. 409, 18 Stat. 194.

[2] Act of April 28, 1904, c. 1819, 33 Stat. 556.

[3] Act of September 18, 1940, ch. 722, 54 Stat. 954; Section 321 (b) reading in part: "If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier as aforesaid * * *."

[4] 57 F. Supp. 984. The question in the two cases is the same. In one, No. 8957, the 1874 Act is in issue and in the other the 1904 Act.

[5] Act of July 27, 1866, c. 278, 14 Stat. 292.

[6] The major difference between the two Acts is that the one passed in 1874 applied to all railroad land grants while the 1904 Act was applicable only to the Atlantic and Pacific grant in New Mexico.

arose out of the reconveyances by the railroad of lands which enabled the government to perfect title in various homesteaders.

The situation thus created should be distinguished from the right to select "indemnity" lands under Section 3 of the 1866 Act where land covered by the initial grant was found to be already in the rightful possession of others, or otherwise unavailable to the railroad. The later Acts were passed to remedy a situation wherein the railroad's rights were prior in point of time, thus requiring a reconveyance to the United States by the railroad in order that the government might pass good title to subsequent settlers.

In case No. 8957 the Santa Fe in 1916, at the request of the *Secretary of the Interior, reconveyed to the United States certain* lands in accordance with the terms of the 1874 Act, and in 1943 sought to exercise its right of selection accruing as a result of the 1916 relinquishment.

In case No. 8956 the Santa Fe in 1911 again, upon a similar request, reconveyed lands under the provisions of the 1904 Act and in August of 1940 it applied to select lands in replacement for those given up at the government's request under that Act. While its request was pending, the railroad in December 1940 filed with the Secretary of Interior a release under the Transportation Act of 1940 of "any and all claims of what ever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interest granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad."[1]

55 The Commissioner of the General Land Office and the Secretary of the Interior thereafter rejected both of appellant's applications to select "lieu" lands on the grounds that the release under the 1940 Act covered the claims in question and that they could not be asserted after the filing and acceptance of the release.

The release was filed to enable the railroad to enjoy the full applicable commercial rates on certain types of government traffic which had previously been transported at "land-grant" rates, and the Santa Fe concedes that it was effective to wipe out any claims it may have had to indemnity lands as provided for in the original granting Act of 1866, and admittedly as a result of the release the Santa Fe actually surrendered and gave up claims to hundreds of

[1] In accordance with the terms of the statute there were excepted from the release, "* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company. * * *"

thousands of acres of land which it would otherwise have been entitled to demand be patented to it.

However, in bringing these appeals the Santa Fe seeks to establish that, contrary to the District Court holding, the 1874 and 1904 Acts are to be regarded as separate pieces of legislation, conferring on the railroad under the circumstances shown to exist here, a positive right to select lands to replace those reconveyed. Santa Fe maintains that its rights arising under the later acts are not claims for lands granted "in aid of construction" and hence not covered or contemplated by the 1940 Act and the release filed under it.

Shortly stated, the railroad's position here is that the Acts of 1874 and 1904 are not amendments of the Act of 1866, nor Acts granting land in aid of construction, but were enacted to enable the United States to recover title to lands then the property of the railroad in consideration for which it offered a *quid pro quo* in the form of exchange of other lands belonging to the United States.

The lower court has held that the three enactments, i. e., the 1866, 1874 and 1904 Acts, are but parts of a single legislative scheme. Further, it concluded that the 1940 Act, in relation to the granting acts, was intended "* * * to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the concessions made by the Transportation Act of 1940." Santa Fe Pac. R. Co. v. Ickes, 57 F. Supp. 984, 986–7. If we were to accept the position taken by the government and sustained by the lower court to the effect that the 1874 and 1904 Acts are but amendatory of the 1866 Act we would be constrained to hold that the railroad gave up all of its claims under these acts when it filed its release under the 1940 Act. However, we have carefully examined the three "granting acts" in issue in the light of § 321 of the Transportation Act of 1940, and, for reasons which follow, cannot accept the conclusion reached by the District Court.

In interpreting the 1940 Act the Secretary of Interior, judging from the form in which the release was drawn, then considered it applicable only to claims for lands "granted in aid of construction." But the government in its brief suggests a wider significance to the quoted words than we think can be implied.*

56 With this latter interpretation we do not agree. Furthermore, it is perfectly apparent from the language of the release itself that the construction of the 1940 statute now contended for by the Secretary is, as we have seen, at variance with that put upon the same statute by the selfsame Secretary of the

* After quoting from the 1940 Act the government's brief, footnote 7, pg. 11, case No. 8956, sets forth: "In other words, the releases to be filed by the land grant railroads were not limited in their application to any particular grants or to any type of claims arising under the grants, but were to apply to any claim to land under any grant."

Interior when performing his statutory duty of prescribing its terms in conformity with the statute.

Though the legislative history of this particular statute is of little aid on this point, it seems hardly reasonable that Congress should have intended to have the release required under the 1940 Act apply to any claims other than those for lands granted in aid of construction. Otherwise, it is conceivable that the railroads would be required to relinquish land claims which might in no way be related to the lands granted as construction inducements.[9]

Having thus limited the application of the release under the 1940 Act, we proceed to an appraisal of the respective positions of the parties. There is of course no question but that the 1866 Act provided for grants "in aid of construction." Santa Fe Pac. R. R. Co. v. Work, 267 U. S. 511. The rights accruing to the railroad under such a grant are contractual; the railroad receiving the land in return for building and operating a line. Burke v. Southern Pac. R. R. Co., 234 U. S. 669, 680. Further, it will be agreed that the road's rights stemming from the later exchange acts are likewise contractual by nature. Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197. It is from this foundation that the government argues that the right to make selections under the 1874 and 1904 Acts is essentially the same as the right to make selections of indemnity lands under the 1866 Act. Hence, it is urged that the release under the Act of 1940 wipes out the railroad's claims under all three pieces of legislation. The railroad counters with the proposition that these are separate statutes enacted for clearly different primary purposes and thus ought not to be read as one in relation to the 1940 Act.

We perceive substantial reasons for endorsing the point of view advanced by the railroad insofar as it denies that the 1874 and 1904 Acts are to be interpreted as "grants in aid of construction." We may concede, for the purposes of this opinion, that the acts here in issue are "granting" acts, and also that they create contractual rights in many ways comparable to those arising under the original granting Act of 1866 which was in "aid of construction";

57 however, it does not necessarily follow, as the government

[9] For a recent Congressional expression on the matter of the Federal Government's policy regarding the recapture of lands vested in the railroads under various granting acts see: House Report No. 393, 79th Congress, 1st Session, March 26, 1945. (H. R. 694) pg. 12, "* * * It has been suggested that as a condition to the surrender by the Government of its right to these land-grant deductions the land-grant railroads should be required to reconvey to the United States any of the granted lands still held by them. Aside from the fact that, as previously stated herein, the Government has already been more than fully reimbursed for the lands granted by it, this suggestion has been shown by the testimony to be neither equitable nor practicable. * * *

"A large portion of the remaining land-grant lands are held by roads such as the Union Pacific and Central Pacific whose grants contained no requirement for reduced charges on Government traffic. As to the theory on which those roads should be required to give up such lands the committee has heard no suggestion. * * *

"Also among the land-grant roads themselves will be found many which have little or no granted lands remaining to them. The burden of such a condition would thus fall most unevenly even upon the land-grant lines."

contends, that the road's claims under the later acts are all properly identifiable with the 1866 Act.

In support of this view we observe that: (1) The lands released pursuant to the 1874 and 1904 Acts had for all practical purposes vested in the railroad.[10] The railroad's rights were not, therefore, at the time of release, to be classed as mere naked claims, as was the case with regard to "indemnity" rights provided for in the 1866 Act. (2) While the lands reconveyed had been acquired as grants in "aid of construction," the railroad was under no compulsion to release them, and it did so only because of a new promise by the government which guaranteed replacement lands. This transaction cannot be rightly termed ancillary to or amendatory of the original grant. It was not the receiving of a grant in "aid of construction"; the construction phase was long since passed. It was a new bargain, entered into for a new consideration and for a different purpose.[11]

Our decision rests on what we regard as the distinctly separate character of the contractual obligations. Under the 1866 Act the government granted land as an incentive to build. Under the 1874 and 1904 Acts the government granted land in exchange for that which it wished others to have free from any possible claims of the railroads, which admittedly had good title. To say that because the lands relinquished were granted "in aid of construction" other land claims accepted in place and stead of the relinquished lands are to be regarded as subject to the terms of the original grant is, we think, to ignore the succeeding transactions and vitiate contractual rights arising wholly independently of the original Act. We do ont believe that such was the intention of Congress.

Viewed from a slightly different perspective, it will be seen that the government could not have reached the lands relinquished under the 1874 and 1904 Acts had the railroad refused to reconvey—as it had the unquestioned right to do. This was specifically admitted by the Solicitor for appellees in the oral argument in response to a direct question from the court. Admittedly also the lands given up by reconveyance would not have been returned to the government by the release under the 1940 Act. But the government now contends that the voluntary giving up of the once vested lands under the provisions of the 1874 and 1904 Acts, throws the railroad's claims back unto the same footing as those for "indem-

[10] The fact that title had vested was not disputed by appellees either in their brief or oral argument, and we do not regard it necessary to discuss here the mechanics incident to the issuance of patents confirming title to such lands.

[11] This difference in purpose is well illustrated by the following language from Santa Fe v. Work, 267 U. S. 511, 516: "The Act of 1874 was passed to help homestead and other settlers who were in hard case because they established their settlement after the grant to the Railroad Company was held to have attached. The question when it did attach was for a long time doubtful and the subject of litigation. This Act of 1874 was intended to induce the railroad companies to relinquish such lands thus illegally occupied as against them by promising in lieu thereof other lands of equal area in both odd and even sections within the prescribed limits."

nity" lands which had never been selected under the 1866 Act. The dignity of the railroad's rights is thus depreciated by its agreeing to do business with the government at the government's request under the later acts. We cannot agree that such result was in contemplation when the 1874 and 1904 Acts were passed.

58 In our view the rights acquired through relinquishment of vested interests stand equal in strength to the actual holding of the initial grants. In other words, the selection rights accruing from the subsequent transactions are equivalent to the rights in the lands given up and are not, and were not intended to be, effected by the 1940 Act. This, we conceive to be a much sounder approach than that urged by the government which would require us to consider all transactions as a part of one inseparable contractual arrangement whereby the strength of the railroad's claims must be judged by the terms of the 1866 Act.

Even regarding the Acts of 1866, 1874 and 1904 as a part of the same "legislative scheme" does not preclude the result we have reached. Unquestionably the acts are by their character related to the same general problem of adjusting railroad land claims, but this does not foreclose the possibility of separate rights being established as they were by reason of independent transactions in accordance with the respective provisions of the different statutes. The inherent relationship of the acts does not require that we regard them all as "grants in aid of construction," or a reading forward or backward into the others, the terms of any one of them. Further, we do not find this to be a case where the court is bound on any theory to accept the latest statutory interpretation applied by the administrative officer.[12]

In reaching the decision that the Railroad is entitled to have its selections under the 1874 and 1904 Acts reviewed without reference to the 1940 Act release, we have been most mindful of the policy considerations behind the respective pieces of legislation. We believe that neither policy nor precedent is offended by the decision we have reached but rather, that the result will more clearly define and establish the respective interests involved in accordance with the intent of the Congress. Reversed.

Judge Groner is of opinion that the applicable section of the Transportation Act of 1940 is broad enough to cover the lands in dispute, and accordingly is for affirming the judgments of the District Court.

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[12] Cf. Ickes v. Underwood, 78 U. S. App. D. C. 396, 144 F. (2d) 546; and United States ex rel Jordan v. Ickes, 79 U. S. App. D. C. 114, 143 F. (2d) 152; cited in the government's brief.

59 In United States Court of Appeals for the District of Columbia

Nos. 8956; 8957—January Term, 1946

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

Appeals from the District Court of the United States for the District of Columbia

Before GRONER, C. J., and CLARK, and PRETTYMAN, J. J.

United States Court of Appeals for the District of Columbia. Filed Feb. 4, 1946. Joseph W. Stewart, Clerk.

Judgment

These causes came on to be heard on the transcripts of the records from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby, reversed, and that these causes be, and they are hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

PER Mr. Justice CLARK.

Dated February 4, 1946.

Dissenting opinion by Mr. Chief Justice GRONER.

60 United States Court of Appeals for the District of Columbia

No. 8956-7—April Term, 1946

[Title omitted.]

Order substituting party appellee

Filed April 6, 1946

On consideration of appellant's motions to substitute Julius A. Krug, present Secretary of the Interior, as party appellee herein in the place and stead of Harold L. Ickes, resigned, and appellant having alleged that there is substantial need for continuing and maintaining these appeals and obtaining an adjudication of the questions involved, and it appearing that Julius A. Krug consents to these motions to substitute,

It is ordered by the Court that Julius A. Krug, Secretary of the Interior be, and he is hereby, substituted as party appellee herein in the place and stead of Harold L. Ickes.

PER CURIAM.

Dated April 6, 1946.
[File endorsement omitted.]

61 In the United States Court of Appeals for the District of Columbia

No. 8956

[Title omitted.]
[File endorsement omitted.]

Designation of record

Filed April 18, 1946.

The Clerk will please prepare and certify a transcript of record on petition for a writ of certiorari to the Supreme Court of the United States in the above-entitled case, including therein the following:

1. The Joint Appendix to the briefs of the parties in this case;
2. Minute entry of argument;
3. Opinion of this Court;
4. Judgment;
5. Order substituting Julius A. Krug as appellee in place of Harold L. Ickes;
6. This designation;
7. Clerk's certificate.

The Clerk is also requested to send to the Clerk of the United States Supreme Court the original record now on file in
62 his office, which will be returned to him when the case has been disposed of by the Supreme Court.

(S) J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

(S) Roger P. Marquis,
ROGER P. MARQUIS,
Attorney, Department of Justice.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 18th day of April 1946.

(S) Lawrence Cake,
LAWRENCE CAKE,
Attorney for Appellant.

[Clerk's certificate to foregoing transcript omitted in printing.]

63 In the United States Court of Appeals for the District of Columbia

No. 8957

[Title omitted.]

Designation of record

The Clerk will please prepare and certify a transcript of record on petition for a writ of certiorari to the Supreme Court of the United States in the above-entitled case, including therein the following:

1. The Joint Appendix to the briefs of the parties in this case;
2. Minute entry of argument;
3. Opinion of this Court;
4. Judgment;
5. Order substituting Julius A. Krug as appellee in place of Harold L. Ickes;
6. The designation;
7. Clerk's certificate.

The Clerk is also requested to send to the Clerk of the United States Supreme Court the original record now on file in his office, which will be returned to him when the case has been disposed of by the Supreme Court.

J. Howard McGrath.
J. Howard McGrath,
Solicitor General.
Roger P. Marquis,
Roger P. Marquis,
Attorney, Department of Justice.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 18th day of April 1946.

Lawrence Cake,
Lawrence Cake,
Attorney for Appellant.

64 [Clerk's certificate to foregoing transcript omitted in printing.]

65 In the Supreme Court of the United States

[Title omitted.]

Stipulation as to consolidation, etc.

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-captioned cases that:

1. Because the above-captioned cases involve common questions of law and fact, a consolidation will avoid expense and delay, and said cases were heard together and a single opinion was written by the Court of Appeals for the District of Columbia, said cases may be consolidated for hearing and decision on the petition for a writ of certiorari, and, if certiorari is granted, for hearing and decision of the said cases on the merits.

2. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining these cases on the merits, the printed record shall consist of the following:

66 a. Joint Appendix to the briefs of the parties in these cases.

b. The proceedings had before the United States Court of Appeals for the District of Columbia.

3. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of record in the Court of Appeals for the District of Columbia, and any of the parties hereto may refer in their briefs and argument to said transcript of record, including that part which has not been printed as the Joint Appendix.

April 18, 1946.

J. HOWARD MCGRATH,
Solicitor General,
Attorney for Petitioners.

April 18, 1946.

LAWRENCE CAKE,
Attorney for Respondent.

67 Supreme Court of the United States

No. 97—October Term, 1946

Order allowing certiorari

Filed June 10, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

68 Supreme Court of the United States

No. 98—October Term, 1946

Order allowing certiorari

Filed June 10, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.